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SUPREME COURT U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 374

UNITED ENTERPRISES, INC.,
Petitioner,

vs.

ANNE DUBEY, EVA A. LOWTHER, and LEE ORA BROWN, Being and Comprising the Members of the Florida State Board of Beauty Culture Examiners,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petitioner respectfully shows:

I.

Summary and Short Statement of the Matter Involved.

This is an action for a declaratory judgment. The action was originally filed by the petitioner as plaintiff below in

the United States District Court for the Northern District of Florida, against the respondents, defendants below, who comprised the Florida State Board of Beauty Culture Examiners (Rec. 4). A declaratory judgment was sought, holding and declaring the Florida State Beauty Culture Law (Chapter 16800, Florida Acts of 1935, as amended by Chapters 20333 and 20860, Acts of 1941) inoperative and inapplicable to the business of the petitioner.

The cause was submitted to the trial court upon the pleadings and the agreed statement of facts filed by the counsel for the respective parties. Upon the 8th day of December, 1941, the trial court entered its order, denying the declaratory judgment prayed, and dismissed the petitioner's complaint upon jurisdictional grounds (Rec. 58). An appeal was perfected to the United States Circuit Court of Appeals for the Fifth Circuit, and upon the 16th day of June, 1942, said court entered its judgment affirming the United States District Court of the Northern District of Florida, said opinion affirming the cause solely upon the merits (Rec. 72).

The submission of this cause upon the pleadings and the agreed statement of facts placed before the trial court the following facts: Stated concisely, the allegations of the complaint (Rec. 4-17) were:

The petitioner, an Indiana corporation, manufactured cosmetics there, and was engaged in interstate commerce in the sale of same through representatives in the State of Florida, and there pursued a direct sales method of giving a free demonstration of their products to prospective customers. The complaint alleges that these sales demonstrations of petitioner's products to prospective purchas-

ers in Florida consisted of the application of a portion of "cold cream" or "facial cream", which is applied to the face of the prospective customer, and removed, along with a like application of a "liquid skin softener", a "powder base", "powder, rouge and lipstick". This demonstration is made without charge or obligation to the prospective purchaser, and the only profit derived by the petitioner is from the possible sale of cosmetics to such prospective purchaser, and if sold, the same is shipped from Evansville, Indiana, by parcel post C. O. D. direct to the customer in Florida.

The complaint alleges a controversy arose between the petitioner and the respondents, the State Board of Beauty Culture Examiners of the State of Florida, regarding the application of the Florida Beauty Culture Law to the business of the petitioner, said respondents taking the position that under the terms of said Florida law that it was necessary that representatives of the petitioner have certificates of registration issued by said Board as provided by said Florida Beauty Culture Law.

The material portions of said Florida Beauty Culture Law are set out in the complaint (Rec. 7-12). Among others, said Florida Beauty Culture Law provides that it shall be unlawful for anyone to engage in the practice of beauty culture without a certificate of registration issued pursuant to the provisions of the Act, by said Board. Said Act also provides that the application of cosmetic preparations, antiseptics and powders to the face or neck constitutes the practice of beauty culture. In order that a person be qualified to receive a certificate of registration, he must have practiced as a *registered junior operator* for a period of twenty-four months under the personal supervision of a registered beautician. (Modified by amend-

ment of 1941 and set out in the printed record under the agreed statement of facts (Rec. 39), Section C of the Act. Period reduced by 1941 amendment to 12 months.)

Such person must also have passed a satisfactory examination conducted by the Board to determine his fitness to practice beauty culture, which includes practical demonstrations in shampooing the hair, hair-dressing, marcelling, permanent waving, water waving, hair coloring, manicuring, facial massage and scalp massage, with the hand; written and oral tests in antiseptics, sterilization, sanitation and the use of mechanical apparatus, and electricity as applicable to the practices of the occupation of a beautician, and may include such other demonstrations, and tests as the Board in its discretion may require. To become a *registered junior operator*, a person must be graduated from a school of beauty culture approved by the Board and must have passed a satisfactory examination which shall cover the practices outlined above. The Act defines a school which could be approved by the Board, and sets up the requirements in respect thereto. A course of study and instruction is prerequisite to graduation from such a school of not less than 1000 hours of continuous study within a period of 12 months, and not less than 6 months, which course of instruction is to include the followings subjects:

> "Scientific fundamentals for beauty culture, physiology, hygiene, elementary chemistry relating to sterilization and antiseptics, managing and manipulating the muscles of the face, neck and scalp, hair cutting, bobbing, hair trimming, and dyeing the hair, shop management and business methods, facial and scalp massages, or treatments with oils, creams, lotions or other preparations, shampooing, singeing, or applying hair tonics, applying cosmetic preparations, antiseptics, powders, oils, clay or lotions to scalp, face or neck.

"Hairdressing or the arranging, waving, dressing, curling, cleansing, thinning, cutting, singeing, bobbing, bleaching, tinting, coloring, straightening, dyeing, brushing, beautifying or otherwise treating by any means the hair of any person.

"Manicuring or the cutting, trimming, polishing, tinting, coloring, cleansing, or manicuring the nails of any person, and massaging, cleansing, treating, or beautifying the hands of any person.

"Permanent waving, or the preparing, arranging, curling, cleansing, and treatment of the hair for curling, by the use of permanent waving machines, mechanical appliances or chemical heat devices or heat materials.

"Removing superfluous hair from the body of any person by the use of electrolysis, or by the use of depilatories, by the use of tweezers, chemical preparation, or by the use of devices or appliances of any kind or description, except by the use of light waves commonly known as rays. * * * "

The Act provides the fees which an applicant must pay to the Board, and also provides that the violation of the Act shall constitute a misdemeanor, and upon conviction be punishable by fine and imprisonment.

That in the controversy above referred to, the petitioner took the position that in performing the demonstration of cosmetics, their sales persons were not in reality engaged in the practice of cosmetology or beauty culture. That their said business constituted interstate commerce. That said Act of the State of Florida placed an unreasonable burden upon petitioner's interstate business, and was not a valid exercise of the police power of the State of Florida with respect to the acts and demonstrations aforesaid, and therefore said Act violates Article I, Section 8, Clause 3 of the Constitution of the United States, and that the re-

quirements of said Act, if construed to apply to the appellant's representatives, the same would place an unreasonable burden upon said representatives of the appellant in requiring that said representatives be licensed and registered to practice several branches of beauty culture in which they do not claim or intend to be proficient, and which they do not attempt to practice, in order that they be permitted to perform the acts and demonstrations aforesaid, and said Act is therefore violative of the Fourteenth Amendment of the Constitution of the United States. The complaint also alleges that said controversy resulted in the arrest of said representatives in Florida, and in continued threats of arrests and prosecutions of petitioner's said representatives, creating such a state of affairs that it was impossible for the petitioner to continue to do business within the State of Florida. Allegations are contained in the complaint that petitioner had regularly employed five to seven representatives in the State of Florida who were not licensed, and all of whom in their sales practices, gave demonstrations of petitioner's products, and prior to the interference and intimidation of petitioner's employees, they did regularly produce sales of cosmetics resulting in a regular average profit to the petitioner in the sum of four hundred dollars ($400.00) per month, or forty-eight hundred dollars ($4,800.00) per year, and that except for said interference, prosecutions and arrests upon the part of said Board, the petitioner would have continued to do business in a like volume with the same resulting profit through the balance of 1940 and 1941, and thereafter. The complaint also contains allegations that it is not possible for the petitioner to draw its sales representatives from those licensed under the provisions of the Act. That the number of persons so licensed is limited, and said number so licensed does not include a sufficient number so inclined or

interested, and with the necessary sales ability, and if the petitioner were limited in the selection of its representatives to those licensed under the Florida Act, it would be impossible for the petitioner to employ suitable representatives in the State of Florida to carry on its business under the sales practices herein outlined, all with the resulting financial injury as above stated.

By the complaint, the petitioner sought a declaratory judgment, decreeing the Florida law inoperative and inapplicable to the business of the appellant, and that said Act be declared unconstitutional, and for all other relief.

Stated concisely, the allegations of the respondents' answer to the petitioner's complaint in the trial court herein, four defenses were stated (Rec. 18-24) as follows:

The first defense raises the question of jurisdiction. The second defense denies the allegations of the complaint, justifies the exercise of the police power of Florida under the Act in question upon consideration of public health, sets up specific violations of this Act by representatives of the petitioner, and denies that an unreasonable burden upon petitioner's interstate business results from the enforcement of the Act. The third defense avers that an adjudication of this controversy in favor of petitioner will operate to enjoin or suspend the enforcement of the orders of said Board of Beauty Culture contrary to the terms of Subsection 1, of Section 41, Title 28, United States Code. The fourth defense avers that an adjudication of this controversy will operate to enjoin the collection of a tax imposed by Florida contrary to Sub-section 1 of Section 41, Title 28 of the United States Code.

So far as is material the agreed statement of facts filed by the parties provides (Rec. 25-57):

"That the allegations of fact only stated in plaintiff's amended complaint relating to the amount and extent of its present and future business in the State of Florida are true."

Said agreed statement of facts also contained the following:

"That the activities of plaintiffs agents and 'demonstrators' within said State of Florida objected to, or opposed by, or under the authority of, said defendant Board, and on account of which this suit was brought and is now pending and which constitute the sole and only dispute and controversy between the parties hereto, are: plaintiff's sales representatives engaged a number of women to work as 'demonstrators' in various beauty shops in Florida where plaintiff desired to establish trade outlets for its said cosmetic products. These 'demonstrators' were first given a two weeks' course of training by the sales representatives in the application and use of plaintiff's merchandise upon prospective customers. They were then furnished with a 'kit' containing the creams and preparations necessary to the giving of the demonstrations hereafter described. The 'kit' size contained a spatula for removing the creams from the jars in which they were packed when giving the demonstrations and an eyebrow brush for applying 'makeup' to the eyes of the customer, if requested. The 'demonstrator' was required to further equip herself with small cloths or towels to be used as headbands. These were arranged upon the customer to protect her hair from the preparations used in the demonstration.

"The sales representative and one of the 'demonstrators' then entered a beauty shop with this proposal to the shop owner or operator: The 'demonstrator' would remain in the shop for a short time, giving demonstrations of plaintiff's merchandise to prospective customers and promoting its sale. These would be drawn from women casually entering the shop or brought there by special appointment. In order to in-

duce the prospect to buy, the 'demonstrator' would propose that she give to the prospect a demonstration in the use of the merchandise. The materials in the 'kit' were used. The prospect would be taken into one of the regular booths maintained in the shop for giving beauty treatments. She would be placed in a reclining position in a regular reclining chair or couch, commonly known as a 'facial' couch. Towels (furnished by the shop) would be adjusted about the shoulders and body of the prospect. One of the 'demonstrators' headbands would be put in place. The demonstration then proceeded in this manner:

"(1) Plaintiff's merchandise, known as a cleansing cream, would be applied over the entire face with spreading and stroking movements, then all of it would be removed with tissue.

"(2) Another of plaintiff's preparations known as a special throat cream and eye cream would be placed over the throat and eyes.

"(3) The remaining portion of the face would be covered with another of plaintiff's preparations known as a 'skin food'.

"(4) The face was then gently manipulated with the fingers.

"(5) Over this would be placed another of plaintiff's preparations consisting of a white cream or 'clay' and known as a 'beauty pack.' This was allowed to dry for eight or ten minutes.

"(6) It was then thoroughly removed with cloths soaked in warm water.

"(7) An astringent lotion or cream was then smoothed over the face.

"(8) The 'demonstrator' then applied 'make up' consisting of face powder, rouge on the cheeks and lipstick on the lips. If the customer desired, 'make up' was placed about the eyes.

"This entire process was conducted by the 'demonstrator' and the materials used were those manufactured by the plaintiff. It consumed from forty to forty-five minutes. It is what is known in the beauty trade as a 'facial' and is given for the purposes of beautification. No charge was made, but if there was a sale, an order was taken and a cash deposit was given to the 'demonstrator' who kept it as her own. This obligates the plaintiff to make delivery of said specified merchandise and provides that the cosmetics purchased will be mailed to the purchaser C. O. D. direct from Evansville, Indiana, by parcel post. The deposit which is paid to the 'demonstrator' constitutes part of the purchase price, and is retained by the salesman or 'demonstrator' as her commission in full. The balance of the purchase price is collected by the Postal Authorities on the delivery of the merchandise by Parcel Post upon a C. O. D. basis. Full payment of the merchandise is not accepted from the purchaser in advance. A copy of the order blank is left with the purchaser, and the other copy is sent by the representative to the Evansville, Indiana office of the plaintiff, and there the merchandise so ordered is packed and shipped by parcel post C. O. D. direct to the purchaser.

"The shop owner was given a sales credit which might be used in purchasing a stock of goods for sale direct from the shop in the ordinary course of business. Many shops now have plaintiff's merchandise on sale, some of which was purchased following demonstrations, while other shops have acquired a stock of goods independently of any such demonstrations.

"The 'demonstrators' did not obtain certificates of registration provided for by the Florida Beauty Culture Law and hence were arrested pursuant to order of the defendant Board, and such arrests will be repeated pursuant thereto in the event of similar future activities. Neither of said 'demonstrators' had completed the course of study required by such Act in a school of beauty culture approved under the provision thereof, nor had either practiced as a registered junior operator for the period required in said Act and under the conditions therein prescribed, nor had either furnished to defendant Board health certificate required thereby, and said 'demonstrators' have refused to pay the fees prescribed by said Act. Said 'demonstrators' were, and are, thereby hindered, prevented and stopped from carrying on plaintiff's business under the sales practices as above described."

Said agreed statement of facts also contained the following:

"That said 'demonstrators' or sales person of the plaintiff do not advertise or hold themselves out as licensed or registered beauticians under said Florida Beauty Culture Law, or as practicing or engaging in any of the following specific practices:

"1. Cutting or bobbing the hair.

"2. Scalp massage.

"3. Singeing, shampooing or dyeing the hair or applying hair tonic.

"4. Hairdressing or the arranging, waving, dressing, curling, cleansing, thinning, cutting, singeing, bobbing, bleaching, tinting, coloring, steaming, straightening, dyeing, brushing, beautifying, or otherwise treating by any means the hair of any person.

"5. Manicuring, or the cutting, polishing, tinting, coloring, cleansing or manicuring the nails of any person.

"6. Permanent waving or the preparing, arranging, curling, cleansing, and treatment of the hair for curling, by the use of permanent waving machines, mechanical appliances or chemical heat devices or heat materials."

II.

Statement of Jurisdiction.

The Supreme Court of the United States has jurisdiction to review the decision in this cause of the United States Circuit Court of Appeals for the Fifth Circuit, under the provisions of Section 240(a) of the Judicial Code of the United States, 28 U.S.C.A. 347(a):

Jurisdiction in this cause of action in the Federal Courts is predicated upon the Judicial Code of the United States, Section 24 as amended, United States Code Annotated, Title 28, Section 41, jurisdiction being based upon diversity of citizenship, and the amount of value of the subject matter or right being litigated being in excess of the sum of three thousand dollars ($3,000.00).

The United States District Court for the Northern District of Florida, by its written opinion, held it was without jurisdiction (Rec. 59-62). However, the United States Circuit Court of Appeals for the Fifth Circuit held the jurisdictional question was improperly determined by the trial court, and said United States Circuit Court of Appeals in its opinion said (Rec. 70):

> "The question of federal jurisdiction is reached first, and we think it must be decided in favor of appellant. The complaint alleges that the yearly profits of the corporation from its business in Florida amounted to $4800, and that, if appellees continued to regulate its employees and its business under the statute, it would be forced thereby to discontinue its

business in the state as carried on by means of the demonstrations, and, as a consequence thereof, it would sustain damages in excess of $3000. There is no claim that this allegation was not made in good faith, nor that the appellant's right to do business in Florida is not worth more than $3000. The value to appellant of the right to transact its business freed from the restraint of the statute is determinative of the amount in controversy, which value is fixed by the *ad damnum* clause of the complaint, asserted in good faith, at a sum sufficient to confer jurisdiction upon the court below."

As further sustaining the jurisdiction of the Supreme Court of the United States of America upon the within petition for certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, this cause of action upon its merits presents a Federal constitutional question of gravity and general importance. This said constitutional question was raised in the first instance by the complaint and said constitutional question relating to the merits of this controversy upon which this cause was tried in the United States District Court for the Northern District of Florida, and upon appeal in the United States Circuit Court of Appeals for the Fifth Circuit. This constitutional question was as follows: Petitioner, by its complaint for a declaratory judgment, sought to have the Florida Beauty Culture Law declared inapplicable to its business in the State of Florida, or, if applicable, violative of Article 1, Section 8, Clause 3, of the Federal Constitution, and the Fourteenth Amendment thereto, thereby specifically questioning said statute of the State of Florida as being a proper exercise of the police power of that State. The question so raised brings the inquiry to a determination of whether the enactment of the Florida Beauty Culture Law, concededly in the interest of the public health, bears any real and substantial relation to that problem as it is

particularly applied to the interstate business of the petitioner in the State of Florida. The petitioner herein has throughout this cause of action taken the position that the enactment of the State of Florida so considered, constitutes an unreasonable burden upon petitioner's interstate business, contrary to the Federal Constitution. The trial court, and the Circuit Court of Appeals have erroneously failed to sustain the position of the petitioner, and this presents a question of gravity and importance in that it involves the ever-increasing effort upon the part of the States to establish state barriers, and the ever-increasing effort upon the part of the States to impose upon simple trades and professions despite the interstate character of their business, arbitrary and unreasonable restrictions.

III.

Questions Presented.

This petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit questions the correctness of their decision and judgment in this cause of action on the merits, whereby the decision and judgment of the United States District Court for the Northern District of Florida was affirmed. The petitioner herein takes the position that said decision of said Circuit Court of Appeals is erroneous in that it holds the Florida Beauty Culture Act, as applied to the interstate business of the petitioner, is a valid exercise of the police power of that state, and violates and transgresses no Federal constitutional limitations. This erroneous holding and decision is entered in this cause despite the fact that the evidence reveals without dispute that the petitioner's business in Florida is interstate in character; that the free demonstrations of petitioner's products, consisting of the application of a small portion of cold cream to the face of another, is but

a mere incident to a prospective sale of petitioner's products. That petitioner's representatives are salesmen, not beauticians, and do not hold themselves out as such. This petition presents the proposition that said decision is erroneous in failing to hold that the application of said Florida beauty culture law to the business of petitioner, and to its representatives in requiring said representatives to obtain certificates of registration as required by said Act, when as a prerequisite to obtaining such a certificate by specific provision of said Act, to be qualified, a person must have spent as an apprentice (Rec. 39), twelve months under the supervision of a registered beautician, and have previously spent more than six months and a thousand hours of study, and have graduated from a school of beauty culture wherein the course of instruction was devoted to the study of a variety of more than 75 unrelated subjects. (See Section 7 of the Act, in the Record at page 42). For example, an applicant must have become proficient in the art of hair-straightening. The study of these unrelated subjects for a period of more than 18 months, constituted an unreasonable and arbitrary burden upon the petitioner's business, and constituted a regulation having no reasonable or substantial relation to the public health problem purportedly involved.

IV.

Proceedings in the Trial Court.

This cause was submitted to the trial court, the United States District Court for the Northern District of Florida, upon petitioner's amended complaint (Rec. 4017), the answers of the respondents (Rec. 17-25), and upon the agreed statement of facts of the parties, filed with the court (Rec. 25-57). Upon the 8th day of December, 1941, the trial court entered its order denying the declaratory judgment,

and dismissing the complaint of the petitioner on jurisdictional grounds (Rec. 57).

The Opinion of the Trial Court.

The opinion of the trial court is set out in the Record, pages 59-62, and is reported in 42 Federal Supp. 60.

V.

The Decision of the United States Circuit Court of Appeals for the Fifth Circuit.

The opinion of the Circuit Court of Appeals in this cause is set out in the Record, pages 69-72, and is reported in 128 Fed. 2nd, 843. By this written opinion, said Circuit Court of Appeals held the trial court had erroneously determined the jurisdictional question, and in passing upon the merits of this cause of action, erroneously held:

> "The regulatory provisions of the statute are appropriate to the attainment of the legislative object, and are not arbitrary or unreasonable. From its very nature, the practice of beauty culture is essentially an intrastate business as localized in character as any exclusively personal-service enterprise. The fact that a regulatory statute of a state, otherwise valid under rigorous scrutiny, is, in an isolated instance, effective incidentally to burden interstate commerce, does not destroy its constitutionality."

VI.

Reasons Relied Upon for the Allowance of the Writ.

The writ of certiorari as herein prayed, should be granted for the reason that the United States Circuit Court of Appeals for the Fifth Circuit in this cause er-

roneously decided a Federal constitutional question of gravity and importance. The petitioner herein has the right to carry on its interstate business in the State of Florida, free from the arbitrary and unreasonable imposition of the Legislature of that State. The petitioner has the right to a declaratory judgment holding and declaring the Florida Beauty Culture Law to be inapplicable to the business of the petitioner in the State of Florida for the reason that as applied to said business, there the same constitutes an unreasonable and arbitrary, and therefore invalid, attempt upon the part of the State of Florida to exercise the police power of that State. The specific basis of the within petition is that the Circuit Court of Appeals, in deciding the within cause of action upon its merits, erroneously failed to reverse the United States District Court for the Northern District of Florida.

Wherefore, the petitioner herein respectfully prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, to the end that the judgment of said United States Circuit Court of Appeals for the Fifth Circuit may be reviewed and reversed by this Honorable Court.

UNITED ENTERPRISES, INC.,
Petitioner,

By THEODORE LOCKYEAR,

ELMER Q. LOCKYEAR,
Attorneys for the Petitioner.

Dated at Evansville, Indiana,
this 4th day of September, 1942.